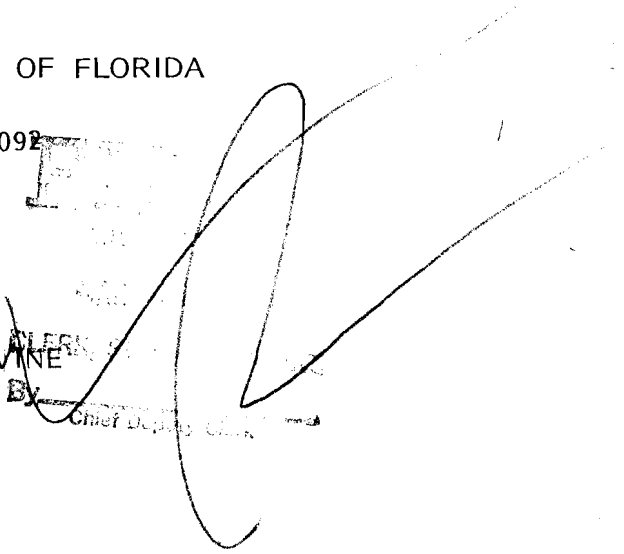
QA 5-6-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,092



STEPHEN B. IRVINE

Petitioner

v.

DUVAL COUNTY PLANNING COMMISSION
and the CITY OF JACKSONVILLE

Respondents

* * * * * *

PETITIONER'S REPLY BRIEF ON THE MERITS

* * * * * *

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SUMMARY OF ARGUMENT

The cases cited by the Respondent in the Answer Brief are inapposite to the issues of whether the zoning authority afforded the Petitioner due process and applied the correct law in finding that the Petitioner did not meet the burden of going forward. These cases, in fact, support the position of the Petitioner.

ISSUE I

WHETHER THE PROCESSES OF THE ZONING AUTHORITY IN THIS CASE AFFORDED THE PETITIONER DUE PROCESS OF LAW?

ISSUE II

WHETHER THE CORRECT LAW HAS BEEN APPLIED IN THE FINDING THAT THE PETITIONER DID NOT MAKE A SHOWING SUFFICIENT TO MEET HIS BURDEN?

The Respondent City has treated the two issues in this case concurrently for the purposes of its Answer Brief, and the Petitioner's Reply shall likewise address those issues concurrently.

The Respondent City argues that the Petitioner has failed to cite any rule, regulation or ordinance of any sort that has been violated by the administrative tribunal or the Courts below in this case, and relates the case of Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, (Fla. 1st DCA 1981) as authority that the burden of proof was not misplaced as contended by the Petitioner. However, the decision in the cited case itself makes reference to the fundemental dissimilarities between various application procedures and notes that the context in which the procedural issues arose in cases it was asked to rely upon bore little resemblance to the issues before them. Likewise, the Petitioner argues that the issues before the Court in the Florida Department of Transportation case, supra, bear little resemblance to the issues at bar.

To begin with, the rule of law cited by the Respondent in its Answer Brief is misquoted and miscited. The actual rule of law referred to in the case is:

> "In accordance with the general rule, applicable in court proceedings, 'The burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.' Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977)."
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> Florida Department of Transportation, supra at 788.

The fault in the Respondents' reliance on this case goes beyond the mere misquotation of its terms. For instance, in a lengthy analysis of the procedures appropriate to a proper administrative hearing, the Court distinguishes between the ultimate burden of establishing the truth of a given proposition or issue and the duty of producing evidence at the beginning in order to make or meet a prima facie case. In holding that the Department of Transportation was properly required to accomplish the first step of making a prima facie case, the Court wrote:

> "We think it essential, both for the benefit of the hearing officer and the petitioning objectors (to say nothing of the agency, and the appellate court) to have on record a basic foundation of evidence pertaining to the application so that the issues can be understood, and so that evidence directed to these issues by the petitioning objectors can be properly evaluated."
>
> Florida Department of Transportation, supra at 788.

This statement, be it the rule of the case or mere dicta, stands in sharp contrast to the case at bar, where a basic foundation of evidence was provided by the Petitioner in his application, in his address to the Commission at the public hearing, and in the findings and recommendations of the Jacksonville Planning Department. What is lacking is the evidence directed to these issues by the neighbors who allegedly called in their objections to the chairman. This evidence, if any,cannot be properly evaluated.

If a rule of the case is to be taken from Florida Department of Transportation, supra, let it be that:

> "In making this preliminary showing of 'reasonable assurances' before the hearing officer, the applicant is required to provide credible and credited evidence of his entitlement to the permit. This having been done, the hearing officer would not be authorized to deny the permit unless contrary evidence of equivalent quality is presented by the opponent of the permit."
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> Florida Department of Transportation, supra at 789.

The context of the decisions in both of the other cases cited by the Respondent City in its Answer Brief are distinguishable from the circumstances presently before this Court. In Plyant v. Orange County, 328 So.2d 199 (Fla. 1976), this Court ruled in the context of Special Acts, Laws of Florida, which have not been adopted or made applicable in Duval County, Florida. It appears that the primary gravamen of that decision was that the Orange County application of the law did not penalize the free exercise of religion. Reliance on the Board of County Commissioners v. First Free

Will Baptist Church, 374 So.2d 1055 (Fla. 3d DCA 1979) is also unwarranted. In that case, the Court ruled that whether it was an "unusual use" or an "exceptional use" the burden of proof was the same, that is, "on the applicant rather than on the county, to establish the criteria, etc., set forth in the Section." Board of County Commissioners, supra at 1056. In the case at bar, the City must argue that the criteria set forth in its Ordinance was not met, when in fact the only criteria specified is that the exception for which the Petitioner applied be controlled as to number, location, and relationship to the neighborhood.

The Respondent City pleads for this Court to ignore the absence of a factual basis for the denial of the Petitioner application. As written by the First District Court in Florida Department of Transportation v. J.W.C. Company, Inc., supra at 789, "If the (objector) fails to present evidence, or fails to carry the burden of proof as to the contraverted facts asserted--assuming that the applicant's preliminary showing before the hearing officer warrants a finding of "reasonable assurances"--then the permit must be approved." The narrow view of the facts asserted by the Respondent City is not consistent with the record. In addition, the failure of the Courts below to address the complete absence of factual findings in the Commission's order and the narrow construction given the facts before the Commission is inconsistent with the decisional law previously applied within the District itself.

The Respondent City answers by accepting stated facts, but contradicts the record by asserting that it is "without dispute that the only 'evidence'

submitted by the Petittioner was that, paraphrased, he spoke in favor of his exception, that the shop had been there 40 years and that similar businesses had operated there." The Respondent fails to realize that it was the Petitioner who also completed the written application required by the City, that it was the Petitioner who diagramed the floor plan, who assembled the list of neighbors to be notified, and who assembled all of the basic information submitted to the City Planning Department for the technical review that eventually led to their recommendation of approval. In suggesting that the Petitioner failed to meet the burden of coming forward with a prima facie case, the City seems to suggest that the tax paying applicant cannot support his application with the findings of a professional planning staff that is funded by tax dollars. In the alternative, the City seems to suggest that the facts and findings of the Planning Department are only to be given credence when the Department recommends denial of an application. The decisional law offered by the Respondent fails to overcome or justify the errors below.

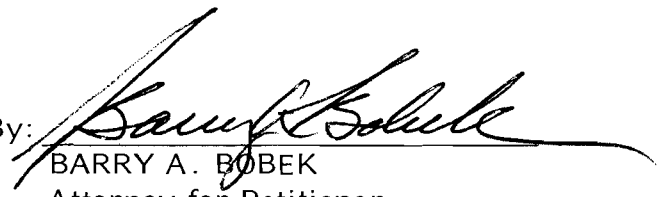
CONCLUSION

Revisiting the cases cited by the Respondent City in its Answer Brief reveals little but that cities and counties may place the burden upon an applicant to show in some defined manner that a particular use serves the public interest. However, in the Jacksonville scheme, as in the framework outlined by Chapter 163, F.S., and in those jurisdictions that follow the Rural New Town decision, the definition and meaning of "exception" is one of a use that

the legislature finds to be of service to the public if controlled as to number, location and relationship to the neighborhood. No doubt, the City may revise this scheme by appropriate legislation and thereby require an exception applicant to meet a different criteria, make an initial showing in greater detail, or go forward without any presumption that the use is one to which an owner is entitled if he meets the limited conditions as to location and number. As it stands, the Petitioner has recognized and met the burden upon him to come forward with a proper application describing the intended use, an application complete to the only extent discernible from the face of the Ordinance itself. No contrary evidence of equivalent quality was presented by any opponent to the application, the denial of the application is unsupported by any recitation of factual findings, and the Petitioner was deprived of the presumption that if controlled, the use by definition promotes the public interests of the area.

Respectfully submitted,

BARRY A. BOBEK, P.A.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to ROBERT G. ALEXANDER, Assistant Counsel, 1300 City Hall, Jacksonville, Florida 32202, and STEPHEN A. HOULD, ESQUIRE, 220 East Forsyth Street, Jacksonville, Florida 32202, by U. S. mail this 26th day of March, 1986.

BARRY A. BOBEK